Office-Supreme Court, U.S.
FILED
MAR 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1454

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CLAUDE COWARD, NORMA FUNKHOUSER, VIOLA GOLDMAN, ANN HUFF, ROSEMARY HYDES, MARY LEE, VERNER BOOTH, BELVA CREECH, GENEVA WELLS, GEORGE HAMBAUGH, CAROLYN FOSTER, LOUIE WIMP, ANDY JOHNSON, RICHARD KERBERG, GEORGE JONES, BERNARD MILLER, JOE HYMAN, CHARLES LYNCH, JAMES REED, ARTHUR SAMPLES, ROBERTA LaPAILLE, MARVIN FUNKHOUSER, BETTY BROCK, MILLS VINCENT, HELEN CARROLL, ROSALIE BURKS, WILLIAM HIGHFILL, DAVE ZOWE, SARA RAPP, KING BLAKELY, RAYMOND KENNEDY, OWEN WOLFE, ELBERT STEVENS, BRADFORD BULLOCK, ERNEST DENSFORD, WILLIAM HESSIG, ELMER KEITH, RALPH MORRISON, VERNIE GOLDMAN, GENEVA WITTINGHILL, JOHN BRUCE, KENNETH SINKHORN, HAROLD BROOKS, ALMA HOUSE, PAULINE HAMBAUGH, VELDA HOUSE and WALTER BLAKELY, - Petitioners

versus

COLGATE-PALMOLIVE COMPANY, EMPLOYEES' RELATIONS COMMITTEE OF COLGATE-PALMOLIVE COMPANY, PLAN ADMINISTRATOR OF THE COLGATE-PALMOLIVE EMPLOYEES' RETIREMENT INCOME PLAN, et al., - - Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

(See inside cover for list of Attorneys)

WESTERFIELD-SCOTT CO., 210 W. KENTUCKY—P.O. BOX 2231, LOUISVILLE, KY.

MATTHEW R. WESTFALL
BAIRD, KIRVEN, WESTFALL & TALBOTT
501 South Second Street
Louisville, Kentucky 40202
(502) 584-7722
Attorney for Respondents

TABLE OF CONTENTS

	PAGE
I. Statement of the Case	2– 5
II. Argument	5–12
A. There Are No Special or Important Reasons That Warrant This Court's Review of Petitioners' First Question	5– 8
B. The Colgate-Palmolive Employees' Retirement Income Plan Is a Defined Benefit Pension Plan, Not a Security or Investment Contract	8–12
III. Conclusion	13

TABLE OF AUTHORITIES

Cases:

PAGE

Bowe, et al. v. *Colgate-Palmolive Company, et al.*, 489 F. 2d 896 (7th Cir., 1973) 4, 6, 7, 8

Daniel v. *International Brotherhood of Teamsters*, 561 F. 2d 1223 (7th Cir., 1977) 9

International Brotherhood of Teamsters v. *Daniel*, 493 U. S. 551 (1979) 8

Marine Bank v. *Weaver*, 50 U.S.L.W. 4285 (1982) .. 10

SEC v. *W. J. Howey Co.*, 328 U. S. 293 (1946) 9, 11

Stevens, et al. v. *Colgate-Palmolive Company, et al.*, 75-1929 (7th Cir., Feb. 17, 1977, unpublished order) 4, 6, 7, 8

Tanuggi v. *Grolier, Inc.*, 471 F. Supp. 1209, (S.D. N.Y., 1979) 11

United Housing Foundation, Inc. v. *Forman*, 421 U. S. 837 (1975) 9

Statutes:

Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, et seq. 2, 10

Securities Act of 1933, 15 U.S.C. §77g(a) 8

Securities Exchange Act of 1934, 15 U.S.C. §77j(b). 8

Rules:

Supreme Court Rule 21.1(b) 2

CERTIFICATE OF INTEREST

The undersigned, counsel of record for Colgate-Palmolive Company, one of the Respondents herein, furnishes the following in compliance with Supreme Court Rule 28.1:

1. The full name of the corporation represented by the undersigned is:

   COLGATE-PALMOLIVE COMPANY

2. The Colgate-Palmolive Company is a corporation having no parent corporation.

3. The names of all subsidiaries (except wholly owned subsidiaries) and affiliates are:

   Colgate-Palmolive (France)

   Colgate-Palmolive (Morocco)

   Colgate-Palmolive (Tunisia)

   Kendall S.A. (France)

   Colgate-Palmolive G.m.b.h. (Germany)

   Colgate-Palmolive (India) Limited (India)

   Kao-Colgate Oral Products Company, Ltd. (Japan)

   Colgate-Palmolive Egypt S.A.E. (Egypt)

   Colgate-Palmolive del Ecuador S.A. (Ecuador)

   Trebla, A.G. (Switzerland)

   Pozuelo, S.A. (Costa Rica)

   Empressa Agro — Mercantil y de Servicio, Agencia Martinima, S.A. (Guatemala)

   Colgate-Palmolive Cote d'Ivoire, S.A.

   Laboratories Larochette, S.A.

Rice Mills (PVT) LTD. (South Africa)
Fabriafrica (South Africa)

MATTHEW R. WESTFALL
BAIRD, KIRVEN, WESTFALL & TALBOTT
501 South Second Street
Louisville, Kentucky 40202
(502) 584-7722
Attorney For Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1454

CLAUDE COWARD, NORMA FUNKHOUSER, VIOLA GOLDMAN, ANN HUFF, ROSEMARY HYDES, MARY LEE, VERNER BOOTH, BELVA CREECH, GENEVA WELLS, GEORGE HAMBAUGH, CAROLYN FOSTER, LOUIE WIMP, ANDY JOHNSON, RICHARD KERBERG, GEORGE JONES, BERNARD MILLER, JOE HYMAN, CHARLES LYNCH, JAMES REED, ARTHUR SAMPLES, ROBERTA LaPAILLE, MARVIN FUNKHOUSER, BETTY BROCK, MILLS VINCENT, HELEN CARROLL, ROSALIE BURKS, WILLIAM HIGHFILL, DAVE ROWE, SARA RAPP, KING BLAKELY, RAYMOND KENNEDY, OWEN WOLFE, ELBERT STEVENS, BRADFORD BULLOCK, ERNEST DENSFORD, WILLIAM HESSIG, ELMER KEITH, RALPH MORRISON, VERNIE GOLDMAN, GENEVA WITTINGHILL, JOHN BRUCE, KENNETH SINKHORN, HAROLD BROOKS, ALMA HOUSE, PAULINE HAMBAUGH, VELDA HOUSE and WALTER BLAKELY, - *Petitioners*

v.

COLGATE-PALMOLIVE COMPANY, EMPLOYEES' RELATIONS COMMITTEE OF COLGATE-PALMOLIVE COMPANY, PLAN ADMINISTRATOR OF THE COLGATE-PALMOLIVE EMPLOYEES' RETIREMENT INCOME PLAN, et al., - - *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents[1] respectfully request that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

I. STATEMENT OF THE CASE

This is a suit for additional pension benefits which certain petitioners waived by voluntarily withdrawing from the Colgate-Palmolive Employees' Retirement Income Plan ("Plan"), and which the remaining petitioners lost as a result of a layoff which terminated seniority and, therefore, the right to further participate in the Plan. All of these events took place well prior to the effective date of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001-1461. The petition in this case presents no issues warranting this Court's review, and none on which the lower courts have disagreed. The petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit therefore should be denied.[2]

From its inception on December 31, 1943, the Plan imposed eligibility requirements as to employees' age

---

[1]Notwithstanding Supreme Court Rule 21.1(b), petitioners did not include in the Petition a list of all parties to this proceeding. In addition to the parties listed in the captions, Respondents here consist of John Doe, Vice President of Employee Relations, John Doe, Vice President of Manufacturing, John Doe, Vice President & General Counsel, and Clayton O. McIntyre, Director of Employee Benefit Plans and Policies.

[2]All references to the petition for a writ of certiorari in this case are cited to the page number in the Petition, *e.g.*, Pet. at ...., and references to the Appendix of that Petition are cited as Pet. App. at .....

and years of service for participation. These requirements were changed periodically as a result of collective bargaining negotiations between Colgate and Local 15 of the International Chemical Workers Union, the bargaining agent for certain employees, including petitioners, at Colgate's Jeffersonville, Indiana plant. Effective January 1, 1977, the Plan became non-contributory and Colgate assumed full financial responsibility for contributions to the Plan.

Between 1955 and 1967, 39 petitioners voluntarily withdrew from the Plan and were refunded the amount of their contributions. None of them had vested rights in the Plan prior to withdrawals. All withdrew prior to January 1, 1968, by signing waiver cards.[3] By negotiated amendment to the Plan to be effective January 1, 1968, continuous service for Plan credit purposes was defined to exclude any period of non-participation while eligible and any period prior to withdrawal from the Plan.

---

[3]Each of these petitioners signed a waiver card which set forth above their signature the following:

WAIVER CARD Cert. #.....

I HEREBY
CERTIFY THAT: Withdrew from plan at his request on ....., ... to obtain money for payment of debts.

I HAVE BEEN GIVEN AN OPPORTUNITY TO PARTICIPATE IN THE EMPLOYEES CONTRIBUTORY GROUP ANNUITY PLAN WITH THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. THE BENEFITS OF THE PLAN HAVE BEEN THOROUGHLY EXPLAINED TO ME. I UNDERSTAND FULLY THE BENEFITS AVAILABLE TO ME UNDER THE PLAN AND I DECLINE TO PARTICIPATE.

As the district court found, in every case, before these petitioners withdrew from the Plan, a Colgate official read the waiver card to each of them, explained what they were forfeiting before they signed the cards in his presence, and wrote a note describing each withdrawal which was typed on the back of each waiver card. After withdrawal from the Plan, each of the withdrawing petitioners at various times re-enrolled, but calculation of future pension benefits was based on future service only, in accordance with the terms of the Plan.

The remaining petitioners were discontinued from the Plan when they lost seniority as a result of extended layoffs. These petitioners were refunded the amount of their contributions at the time they lost seniority and therefore, according to the terms of the Plan, were no longer eligible to participate. They claim a restoration of all rights in the Plan prior to their loss of seniority. These petitioners were involved in legal actions which adjudicated their seniority for all purposes.

Each petitioner who lost seniority and was discontinued from the Plan as a result was a participant in either *Stevens, et al.* v. *Colgate-Palmolive Company, et al.*, Civil Action No. NA 72-C-43 (D.C. S.D. Indiana), affirmed by unpublished Order of the Seventh Circuit Court of Appeals on February 17, 1977, and reproduced in the Appendix of this brief, or *Bowe, et al.* v. *Colgate-Palmolive Company, et al.*, 489 F. 2d 896 (7th Cir., 1973).

These two decisions established and finalized the seniority dates of these petitioners which is controlling for Plan benefits. As the district court found:

> "Therefore, this litigation established the seniority dates of each of these 14 plaintiffs. The 7th Circuit Court of Appeals sustained the finding of the District Court that there was no merit to the claim of any of the plaintiffs to seniority and benefits pre-dating their current existing seniority date." (Pet. App. at A-6 and A-7).

II. ARGUMENT

A. There Are No Special Or Important Reasons That Warrant This Court's Review Of Petitioners' First Question.

Petitioners pose their first question as follows: "Whether or not hourly employees who are members of respondent Retirement Income Benefit Plan are entitled to all benefits of the Plan which came into being during the time of their full participation in the Plan which participation was never subsequently interrupted?" (Pet., at 2). The precise issue that petitioners seek to raise through this question ignores the following uncontroverted facts in this case as found by the district court and the Seventh Circuit Court of Appeals:

1. Petitioners have not been continuous members of the Plan since the date they first became eligible to join.

2. As to each petitioner there were periods, after initial participation in the Plan, of non-

participation in the Plan due to voluntary withdrawal or loss of seniority.

3. When each petitioner subsequently re-enrolled in the Plan, such re-entry was on a future service basis only.

4. The seniority and *pension credit entitlement* of those petitioners terminated from Plan participation due to loss of seniority has been adjudicated and finally decided by the Seventh Circuit Court of Appeals in *Bowe* v. *Colgate,* 489 F. 2d 896 (1973) and *Stevens* v. *Colgate,* unpublished Order reproduced in Appendix (February 17, 1977).

Petitioners further ignore the uncontradicted fact that their periods of non-participation in the Plan and periods prior to withdrawal from the Plan have been excluded from the Plan definition of continuous service since January 1, 1968. Under the very definitions of the Plan itself, petitioners' claims are excluded. The improved Plan benefits negotiated subsequent to petitioners' withdrawals, which they now claim, were conditioned upon an employee's having participated in the Plan *continuously* since the date first eligible. Therefore, there can be no issue that, by the very terms of the Plan itself, petitioners were not entitled to the benefits which came into existence subsequent to their respective periods of non-participation.

Petitioners' first question assumes that those who waived their benefit credits by voluntary withdrawal and those who lost their credit as a result of extended

layoff are entitled to retroactive benefit credits based on amendments to the retirement plan which came into effect on January 1, 1977. This specific question and proposed construction were addressed and rejected by the Court of Appeals:

> ". . . , we do not believe that the provisions of the amended plan at issue in this case support such a construction. The plan has always provided that any period prior to withdrawal is not recognized in calculating pension benefit credits. In 1974, amendments to the plan granted retroactive credit to the date of hire *only* to those employees who had been continuous participants in the plan from the date of their eligibility." (Court's emphasis) (Pet. App. A-17).

The previous court decisions involving the petitioners whose seniority loss caused termination from the Plan are *res judicata* as to these petitioners' current claims. The Court of Appeals agreed with the district court, and concluded:

> "On the merits, decisions, in *Bowe* v. *Colgate-Palmolive,* 489 F. 2d 896 (7th Cir., 1973); *Stevens* v. *Colgate-Palmolive,* No. 75-1929 (7th Cir., Feb. 17, 1977, unpublished order), involving the same parties to the claim under review, are *res judicata* as to the issue of the effect of plaintiffs' extended layoffs on their pension benefit credits." (Pet. App. A-16).

Despite petitioners' attempt to distinguish the present claims for pension credits from seniority credits in the earlier cases, the pension credits were

sought as part of the relief in both *Bowe* and *Stevens*. See footnote 5 to Court of Appeals decision. (Pet. App. A-16).

The answer to petitioners' first question about entitlement to improved Plan benefits must be negative. Petitioners simply do not qualify under the terms of the Plan.

B. The Colgate-Palmolive Employees' Retirement Income Plan Is A Defined Benefit Pension Plan, Not A Security Or Investment Contract.

Prior to January 1, 1977, the Plan was funded by contributions from employees and Colgate. Thereafter, the Plan benefits were funded solely by Colgate.

Petitioners' allegations of violations of the Securities Exchange Act of 1933, 15 U.S.C. §77g(a), and the Securities Exchange Act of 1934, 15 U.S.C. §77j(b), were framed in the erroneous belief that the Plan constituted a "security" within the meaning of these Acts.

The district court and the Court of Appeals both rejected this theory. Indeed, the district court scrutinized the facts relating to these allegations and concluded:

> "Clearly there is no fraud in this case in view of the extensive efforts of Colgate through its supervisors to persuade each and every employee to maintain their participation in the Plan rather than exercise an option to withdraw and receive back their cash contributions." (Pet. App. A-7).

Petitioners' reliance upon *International Brotherhood of Teamsters* v. *Daniel*, 493 U. S. 551 (1979) to

support their theory is out of step with the law. The instant case was filed in the district court in October, 1977, right on the heels of the Seventh Circuit decision in *Daniel* v. *International Brotherhood of Teamsters,* 561 F. 2d 1223 (7th Cir., 1977). During the short period of the viability of the Seventh Circuit decision, petitioners adopted the Seventh Circuit's rationale and sued Colgate. In a relatively short span of time, well before entry of summary judgment on January 21, 1981, by the district court, that rationale was rejected by the Supreme Court.

This Court's holding in *Daniel* was that interests in compulsory, noncontributory pension plans providing for defined benefits are not securities. Since January 1, 1977, the Colgate Plan has been a noncontributory, defined benefit pension plan. Prior to that it was a contributory, defined benefit pension plan. The *Daniel* decision fully supports the district court's and Court of Appeals' conclusions that the Colgate Plan *prior* to 1977 was not a "security" as defined by the Securities Acts. There can be no question that since January 1, 1977, the Plan was not a security.

First, under the so-called *Howey* test, (*SEC* v. *W. J. Howey Co.,* 328 U. S. 293, 301 (1946); *United Housing Foundation, Inc.* v. *Forman,* 421 U. S. 837 (1975)), the Court held that noncontributory, compulsory pension plans do not involve "an investment of money in a common enterprise with profits to come solely from the efforts of others", and therefore do not "comport with the commonly held understanding of an investment contract". 493 U. S. at 559.

Second, the Court found that neither the Securities Acts nor their legislative histories evinced an intent to cover pension plans, although pension plans had existed since the statutes' enactment. 493 U. S. at 563-65.

Third, the enactment of ERISA, 29 U.S.C. §1001 *et seq.*, which "deals expressly and in detail with pension plans", further convinced the Court that the Securities Acts did not extend to noncontributory, compulsory pension plans. *Id.* 569-70.

The second and third grounds relied on by the Supreme Court in *Daniel,* relating to the legislative intent of the Securities Acts and to the enactment of ERISA are equally applicable to the Colgate Plan. Congress chose not to have included pension plans in the coverage of the Securities Acts though it might, by plain language, have included them. Moreover, by providing for the close regulation of pension plans through ERISA, Congress acknowledged that "it was filling a regulatory void" in the Securities Acts. *Id.* 570. See also *Marine Bank* v. *Weaver,* 50 U.S.L.W. 4285, 4287 n. 7 (March 8, 1982). ("Since ERISA regulates the substantive terms of pension plans, and also requires certain disclosures, it was unnecessary to subject pension plans to the requirement of the federal securities laws as well".) (dictum).

Petitioners' second question to this Court assumes that, as Plan participants, they had a reasonable expectation of profits derived from the successful investment of Colgate Plan assets. Although the argument may ring true in an abstract sense, it ignores the economic realities of the situation. At least in the case

of a defined benefit plan, such as the Colgate Plan, any profits realized on the investment of Fund assets becomes an indivisible part of the Fund. These profits are not attributed to each participant's "investment" in such a way that an employee's contributions can be said to yield any individual return.

In addition, "the profit element of the *Howey* test is not satisfied when the benefits due a participant upon retirement are not primarily dependent on the success or failure of the trustees' investment efforts to generate asset earnings". *Tanuggi* v. *Grolier, Inc.*, 471 F. Supp. 1209, 1214 (S.D. N.Y. 1979); see also *Daniel*, 493 U. S. at 562. As in *Daniel*, the Colgate Plan counted on employer contributions to make up for any shortfalls in earnings necessary to provide benefits for those eligible to receive them. Under those conditions, any interest a participant might have in profits generated by the Plan are even more tenuous.

The true nature of the Colgate Plan is further illumined by the fact that the amount of pension benefits that participants receive is a function of the level of his compensation and length of service. Nothing in the Plan links the success of its investments to the level of benefits. If anything, the Plan's profits serve merely to reduce the amount that Colgate must contribute to maintain the financial health of the Plan. Thus, any stake that the participants have in the investment success of the Plan is remote at best.

The court in *Tanuggi*, which excluded a shared contribution plan from the Securities Acts, correctly concluded that:

> "[the participating employees'] interest in the Plan is more like an interest in a deferred, fixed annuity than an investment contract. . . . Here, the plan's appeal to the participant is its insurance-like 'stability and security' and not the prospect of growth. . . . The Plan simply receives the employee contributions from the employer and applies them towards a group annuity." 471 F. Supp. at 1215 (Citations omitted).

Moreover, "[t]he risk of loss arising from the failure of the employer to contribute and inadequate investments is a different type of risk than that commonly associated with a security". *Id.*

Colgate's pre-1977 Plan was nothing more than a fixed benefit, group annuity plan in which asset growth, i.e., expectation of receiving benefits in excess of contributions, was entirely contingent upon the fulfillment of vesting requirements and longevity. In this regard, the Colgate Plan has as its appeal an "insurance-like stability and growth", and cannot be equated to a security. It necessarily follows that the Securities laws are not applicable to the Colgate Plan.

III. CONCLUSION

For the reasons stated, Respondents respectfully urge that the instant petition be denied.

Respectfully Submitted,

MATTHEW R. WESTFALL
BAIRD, KIRVEN, WESTFALL & TALBOTT
501 South Second Street
Louisville, Kentucky 40202
(502) 584-7722

Attorney for Respondents

I, MATTHEW R. WESTFALL, Attorney for Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that on March 14, 1983, I served three copies of the Respondents' Brief In Opposition on the Petitioners by mailing such copies in duly addressed envelopes, first class, postage prepaid, to John O. Moss, Esq., 156 East Market Street, Suite 701, Indianapolis, Indiana 46204. All parties required to be served have been served.

Matthew R. Westfall

MATTHEW R. WESTFALL
BAIRD, KIRVEN, WESTFALL & TALBOTT
501 South Second Street
Louisville, Kentucky 40202
(502) 584-7722
Attorney for Respondents

No. 75-1929

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

Heard October 20, 1976
February 17, 1977

ELBERT STEVENS, et al., - - *Plaintiffs-Appellants,*

v.

COLGATE-PALMOLIVE COMPANY and
INTERNATIONAL CHEMICAL WORKERS,
LOCAL NO. 15, - - - *Defendants-Appellees.*

Appeal from the United States District Court
for the Southern District of Indiana
New Albany Division
No. NA 72-C-43, William E. Steckler, Judge

ORDER

BEFORE: HON. TOM C. CLARK, Associate Justice (Retired)*
HON. LUTHER M. SWYGERT, Circuit Judge
HON. WALTER J. CUMMINGS, Circuit Judge

This lawsuit was filed by nine male employees and a retired male employee of the Colgate-Palmolive Company's plant in Jeffersonville, Indiana. In their class suit under Section 706(f) of the 1964 Civil Rights Act (42 U.S.C. § 2000e-5(f)), they claim that their Union (defendant In-

---

*The Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

ternational Chemical Workers, Local No. 15) and Colgate discriminated against men in that they were not allowed to work on "finishing labor" jobs in Colgate's Toilet Article or Shipping Departments. Their employment with Colgate originated in 1947. They were laid off from early August 1957 to late August 1958, although during that same layoff period women with less plant-wide seniority were retained in such "finishing labor" jobs. As a result of the layoff, under the terms of the collective bargaining agreement with Colgate plaintiffs were divested of their accumulated seniority of ten years. When they returned to work on August 25, 1958, they were rehired as new employees with plant seniority only from that date forward.

After exhausting their administrative remedies before the Equal Employment Opportunity Commission, plaintiffs received right-to-sue letters dated August 1, 1972, and this suit was filed 27 days thereafter. They asked the district court to grant them and their class

> "the accumulated back seniority they have lost, with all benefits, including but not limited to, back pay, increase in renumeration [sic], vacation rights, sick leave and pension rights to which they would have been entitled had they not been wrongfully classified, denied recall or laid off on the basis of sex."

They also asked to be given "seniority in a secondary department equivalent to that accorded females" also working at Colgate's Jeffersonville plant. This means that if they moved from their home department to a new or secondary department, their home department seniority would remain with them.

The present lawsuit resembles a previous lawsuit filed by Colgate's female employees culminating in two opinions of our Court, both entitled *Bowe* v. *Colgate-Palmolive Co.*

Bowe I is reported in 416 F. 2d 711 (7th Cir. 1969), and *Bowe II* in 489 F. 2d 896 (7th Cir. 1973).

Following our decision in *Bowe II*, Colgate and the Union moved the district court to dismiss this complaint on the ground that similar issues had been resolved by this Court against Colgate's female employees, so that the present complaint should be dismissed for failure to state a claim upon which relief can be granted. On January 10, 1975, the district court filed a short opinion refusing to dismiss this complaint on the ground that it might involve a totally different factual situation from *Bowe II*. However, the court concluded, "[i]f the discovery indicates that it would be impossible for the Court to remedy the effects of the 1957 layoff, a motion for summary judgment could then dispose of the action." This prompted the plaintiffs, the Union and Colgate to file motions for summary judgment in March 1975.

On August 12, 1975, the district court handed down another memorandum opinion granting summary judgment to defendants. Judge Steckler decided that the present plaintiffs had merely resurrected an issue that was already resolved in *Bowe II*. He reasoned that any attempt to remedy possible present-day effects of the 1957 layoffs of plaintiffs would necessarily be based on sheer speculation and would be impossible to accomplish in an equitable manner. Consequently, judgment was entered for the defendants. The ten named plaintiffs have appealed from that judgment. We affirm.

Before 1966, the various jobs at Colgate's Jeffersonville plant were designated exclusively for males or exclusively for females, with separate seniority rosters being maintained. This resulted in male employees being laid off at times while female employees with less seniority were retained, and vice versa. When such layoffs lasted more than a year, the laid-off employees lost their accumulated

seniority. In *Bowe I*, certain female employees contended that seniority lost because of such past discriminatory layoffs had to be restored. We agreed with the district court that such relief should only be granted with respect to seniority lost as a result of a layoff which occurred in 1963, for it was "impractical to determine whether any earlier layoffs were discriminatory or to ascertain which employees would currently have more or less seniority if there had been no discrimination." 489 F. 2d at 899. The ten male employees who brought the present suit lost their seniority in a layoff which occurred on August 2, 1957. They wish to have their seniority restored back to their original 1947 dates of hire, even though such relief was denied to female employees in *Bowe II*. As in that case, the defendants are again Colgate and the Union, which is the collective bargaining representative of all these employees.

Title VII of the Civil Rights Act of 1964 prohibiting discrimination based on sex became effective on July 2, 1965. A new collective bargaining agreement complying with that Act eliminated the dual seniority system as of March 1, 1966. The pre-1966 system usually was advantageous to the male employees because they did not have to compete with females for the higher-paying jobs in the plant. However, when reductions in the working force occurred that affected male jobs primarily, the male employees affected could not bump female employees with less seniority. Consequently, male employees were sometimes laid off while junior female employees were retained. Likewise, when a reduction in force primarily affected female jobs, female employees would be laid off while male employees with less seniority were retained. This bifurcated seniority system was the basis of the complaint in *Bowe*.

The plaintiffs in this case raise the same issue as is involved in *Bowe*, namely, whether employees who lose

seniority by being laid off under the prior discriminatory dual system for a period of twelve months or more should have their lost seniority restored. In *Bowe*, the district court resolved this issue as follows:

> "The Court has reviewed this problem in some detail and has concluded that it is simply impossible to determine just what seniority every female employee would have if there had never been a discriminatory seniority system in effect. Moreover, even if such a determination could be made, it is not at all clear that it would necessarily be beneficial to the plaintiffs. Since on some occasions senior male employees were laid off and lost seniority while junior female employees were retained, a complete realignment of seniority for all employees would probably place some female employees in a worse position vis-a-vis male employees than they are in now.
>
> "Accordingly, the Court has decided to adopt the following solution, which appears to be satisfactory to the majority of the plaintiffs. A sizeable number of female employees lost seniority as a result of a layoff which occurred on or before February 22, 1963, and which lasted until February 24, 1964. This was the last layoff prior to the effective date of the Act which resulted in a loss of seniority. The Court will order the restoration of any plant and department seniority lost as a result of this particular layoff, but will not attempt to restore seniority which may have been lost through earlier layoffs or force-outs. It is simply impractical to determine whether such earlier layoffs or force-outs were discriminatory, or to ascertain which employees would have more or less seniority today if there had never been a discriminatory seniority system in effect. The Court believes that the

> solution which it has adopted is fair and equitable to all parties, and is the most practical way of resolving this difficult and complex problem." *Bowe* v. *Colgate-Palmolive Co.*, 6 BNA F.E.P. Cas. 1123, 1125-26 (S.D. Ind., May 7, 1971).

This phase of the district court's order was affirmed in *Bowe II*, 489 F. 2d at 901-902.

It is of course true that even though the dual seniority system has been eliminated, plaintiffs still suffer certain disadvantages as a result of their reduced seniority. Nonetheless, we agree with defendants that for the above reasons given by the district judge in fashioning relief in *Bowe*, plaintiffs should not be granted relief for any losses in seniority occurring prior to 1963.[1] If plaintiffs had their seniority dates changed from August 25, 1958, when they were rehired, to their May and June 1947 original dates of hire, there would be an adverse effect on all other male and female employees whose present seniority dates fall between May 1947 and August 1958. Since female employees laid off unlawfully prior to 1963 did not have their seniority restored for benefit purposes, sex discrimination would be fostered here if this Court were to give plaintiffs a restoration of seniority, even if the relief given would be solely for benefit purposes.

As noted, female employees were laid off while less senior male employees were retained on various occasions. If a non-discriminatory seniority system had been in effect,

---

[1]Plaintiffs' reliance on *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405; *Meadows* v. *Ford Motor Co.*, 510 F. 2d 939 (6th Cir. 1975); and *Palmer* v. *General Mills*, Inc., 513 F. 2d 1040 (6th Cir. 1975), is misplaced. They did not involve a complicated employment background comparable to that presented here and in *Bowe*, nor were they confronted with the kind of careful relief formulated for all employees by the district court and approved in *Bowe II*.

plaintiffs might have been laid off permanently or for more than a year, thus losing their seniority on other occasions. The district court properly recognized that it is impossible to determine whether on balance plaintiffs are worse off today as a result of the fact that prior to 1966 the Jeffersonville plant was operated under a dual seniority system. We will not deviate from *Bowe II* by affording plaintiffs the relief they seek here. To do so would inflict an injustice on the female employees and would ignore the salutatory principle of *stare decisis.*

Judgment affrmed.[2]

---

[2]Because of the result we have reached, it is unnecessary to consider Colgate's argument that plaintiffs' claims are time-barred. See *Evans* v. *United Air Lines,* 534 F. 2d 1247, 1250-1251 (7th Cir. 1976), certiorari granted, 45 LW 3329.